UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOSE SEGURA-GENAO and
FRANKLIN ALCANTARA,

Defendants.

18 Cr. 219-1 (AT)
18 Cr. 219-2 (AT)

ORDER

ANALISA TORRES, District Judge:

In May 2017, the Drug Enforcement Administration (the "DEA") began an investigation into an alleged drug trafficking organization ("DTO") in New York City. In connection with that investigation, it applied for and obtained three court orders authorizing wiretaps. Defendant Jose Segura-Genao moves to suppress the evidence obtained from these wiretaps on the ground that affidavits supplied in support of the Government's applications did not demonstrate necessity for the wiretaps, as required by 18 U.S.C. § 2518(1)(c). ECF No. 51. On February 26, 2019, the Court granted Defendant Franklin Alcantara's letter-motion to join Segura-Genao's motion. ECF No. 93. For the reasons stated below, Defendants' motion to suppress is DENIED.

BACKGROUND

I. The DEA's First Application for a Wiretap (of the -0190 Number)

On December 8, 2017, DEA Special Agent Vanessa Rivera executed an affidavit (the "First Affidavit") in support of an application for a wiretap of a phone number used by Alcantara (the "-0190 Number"). First Affidavit, Spilke Decl. Ex. A., ECF No. 52-1; *see also* Def. Mem. at 1, ECF No. 53. Rivera stated in the First Affidavit that the objectives of the wiretap were to reveal, *inter alia*, the "nature, extent and methods" of the DTO; the identities of the members and their accomplices; the source, receipt, and distribution of contraband and money; the locations and items used in furtherance of the DTO's activity; the locations of records; and the locations

and sources of resources used to finance the DTO's activities. First Affidavit at 5.

She explained that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to achieve the [o]bjectives of the [i]nterception herein sought." *Id.* at 21. She then described the insufficiency of nine categories of "normal investigative techniques," which she claimed made a wiretap necessary. *Id.* at 21–28. The Court will summarize Rivera's descriptions of each of these categories.

First, Rivera discussed the use of undercover officers. *Id.* at 21–22. She stated that because large-scale DTOs are "highly compartmentalized," it is "unlikely that an undercover agent will get any access to members of the organization with whom he does not need to interact for purposes of a specific narcotics transaction." *Id.* at 21. Further, she claimed that it would be "exceedingly difficult, if not impossible to introduce an undercover into the investigation" because the cooperating witnesses (discussed *infra*), who would need to introduce the undercover officers to the members of the DTO, had already "exhausted all efforts" to successfully negotiate a large drug transaction and because "the DTO operates primar[il]y in two countries and is believed to have great familiarity with those communities' members." *Id.* at 22. Finally, she wrote that "attempting to introduce an undercover agent into a DTO inherently comes with risks," and that doing so "may place that person in danger without promising any significant investigatory advantage." *Id.* at 22.

Next, Rivera discussed the use of confidential informants and cooperating witnesses. *Id.* at 22–24. She first stated that "[t]he DEA has so far used three confidential sources to further the [o]bjectives of the [i]nterception" and described their efforts. *Id.* at 22. Earlier in the First Affidavit, she specified that a confidential source "discussed the purchase of 40 kilograms of heroin for $43,000 per kilogram" with co-Defendant Naut, but that a DTO member named "El

Primo" wanted a $200,000 down payment into a bank account first. *Id.* at 19.[1] Rivera added, however, that "none of the confidential sources has access to all members of the DTO or even all the [t]arget [s]ubjects," and that "the insular nature of the DTO has made it difficult for them to obtain additional points of contact to further infiltrate the DTO." *Id.* at 22. She stated that, based on her training and experience and "consistent with the statements of all the confidential sources utilized in this investigation, narcotics traffickers are highly reticent about meeting with unknown persons, or discussing the full scope of their activities with outsiders to their conspiracy or with individuals who are newly introduced as potential co-conspirators." *Id.* at 23. She noted that the Government "continue[s] to look for opportunities to develop additional cooperating witnesses and confidential sources," but that "we have not developed other human sources of information who are in a position to materially aid the investigation[] and we currently have no prospect of finding such a source." *Id.*

Next, Rivera described the use of physical surveillance. *Id.* at 24–25. She stated that she "and other law enforcement officers have conducted surveillance of members of the DTO since approximately September 7, 2017." *Id.* at 24. She added, however, that physical surveillance is "insufficient" because "DTO members typically engage in narcotics transactions indoors, where agents cannot surveil them." *Id.* She claimed that "physical surveillance in and of itself is useful mainly in generating information concerning the identity of an individual, where he or she resides, location[s] he or she frequents, and the identities of the persons with whom he or she meets," but that "it provides limited direct evidence of the significance of the meetings." *Id.* She noted that "[w]hen used in conjunction" with wiretapping, however, physical surveillance "has

[1] The Court notes that in the affidavits, Rivera sometimes uses real names and sometimes uses aliases for the Defendants in this case. Jose Segura-Genao's alias is "Chelo," Franklin Alcantara's alias is "Franklin," and Juan Carlos Naut's alias is "El Socio." *See* ECF No. 11. The Court will only refer to the Defendants by their real names.

proved to be a useful investigative technique," and that she expected the use of wiretaps to "enhanc[e] the prospects for fruitful physical surveillance." *Id.* at 24–25.

Next, Rivera described the use of "geolocation information." *Id.* at 25–26. She first described six judicial orders that the DEA received in connection with its investigation "authorizing agents to obtain geolocation information for several of the [t]arget [s]ubjects." *Id.* at 25. She stated that the orders "have furthered the objectives of the investigation, by, for example, assisting agents in identifying" subjects and the places where they committed offenses. *Id.* at 25–26. She claimed, however, that "for reasons similar to those discussed above with respect to the feasibility of physical surveillance, geolocation information is not a reasonable alternative" to wiretaps, because geolocation information does not "provide information on any unknown person or persons who are meeting with the [t]arget [s]ubjects or the precise nature of the meetings." *Id.* at 26.

Next, Rivera described the use of telephone records and pen registers. *Id.* at 26–27. She stated that in connection with the DEA's investigation, "agents have used subpoenas and court orders to obtain records of voice and electronic communications occurring over the [-0190 Number]." *Id.* at 26. She continued, however, that telephone records provide "only limited information" because, for example, "the use of calling cards and telephone access numbers often hides the ultimate numbers called." *Id.* at 26–27. She added that "fictitious subscriber information is a common practice of narcotics traffickers used to prevent law enforcement from immediately obtaining their identities," and that telephone records "do not provide real time evidence of the content of communications." *Id.* at 27.

Next, Rivera stated that she "is not aware of any previous Title III interceptions relating to any of the [t]arget [s]ubjects." *Id.*

Finally, Rivera described the use of grand jury subpoenas. *Id.* at 27–28. She claimed that

the issuance of such subpoenas to the investigation's targets "would be counterproductive" because it would "tip off the recipient of the subpoena to the existence of the investigation." *Id.* at 27. She stated that the use of search warrants and arrests would be inappropriate at that time for similar reasons. *Id.* at 28.

On the same day the affidavit was sworn, December 8, 2017, the Honorable William H. Pauley, III authorized the wiretap interception of the -0190 Number (the "First Authorization"). *See id.* at 33; Def. Mem. at 4.[2]

II. The DEA's Second Application for a Wiretap (of the -0190 and -9215 Numbers)

On January 5, 2018, Agent Rivera executed a second affidavit (the "Second Affidavit") in support of an extended wiretap of the -0190 Number and a new wiretap of a phone number used by Segura-Genao (the "-9215 Number"). Second Affidavit at 6, Spilke Decl. Ex. B, ECF No. 52-2; *see also* Def. Mem. at 4–5.

In the Second Affidavit, Rivera stated that "intercepted communications obtained pursuant to the [First Authorization] have provided valuable evidence of the DTO's members and workings"—for example, the DEA learned about six new participants—but that "these interceptions cannot fulfill the objectives of this investigation and additional interceptions" of the -0190 Number and "initial interceptions" of the -9215 Number were necessary. Second Affidavit at 36. She claimed that to date, interceptions of the -0190 Number "have not yet revealed how the DTO sources all of its narcotics and which other individuals are involved in obtaining and helping to distribute large quantities of narcotics," and then described specific

[2] The parties have not attached copies of the First Authorization or the Second Authorization to their motion papers. However, Judge Pauley's issuance of the First Authorization is acknowledged on page 20 of the Second Affidavit, and the Honorable Vernon S. Broderick's issuance of the Second Authorization is acknowledged on pages 13–14 of the Third Affidavit. (The Second Affidavit, Second Authorization, and Third Affidavit are discussed and defined *infra*.)

facts the DEA hoped to establish through additional wiretaps of the two numbers. *Id.* at 36–37. For example, she stated that Alcantara "appears to be storing narcotics within a stash apartment he controls, but it is unknown where and from whom [he] obtains these narcotics, who else is involved with the stash house, and who are the customers that [he] supplies with these narcotics." *Id.* at 37. Rivera's statements about the insufficiency of other investigative techniques were similar to those made in the First Affidavit. *Compare* Second Affidavit at 30–38, *with* First Affidavit at 21–28.

On the same day the Second Affidavit was sworn, January 5, 2018, the Honorable Vernon S. Broderick authorized the wiretaps (the "Second Authorization"). *See* Def. Mem. at 5.

III. The DEA's Third Application for a Wiretap (of the -0190 and -5802 Numbers)

On February 2, 2018, Agent Rivera swore an affidavit (the "Third Affidavit") in support of an extended wiretap of the -0190 Number, a wiretap of a new phone number used by Segura-Genao (the "-5802 Number"), and a wiretap of a third phone number not at issue here. Third Affidavit at 6, Spilke Decl. Ex. C, ECF No. 52-3.

In the Third Affidavit, Rivera stated that "intercepted communications obtained pursuant to the [First and Second Authorizations] have provided valuable evidence of the DTO's members and workings." *Id.* at 59. She stated that in total, eight participants in the DTO had been identified, two of whom were identified after Judge Broderick issued the Second Authorization, and that "[l]aw enforcement has also learned certain practices of the coconspirators, such as the ways in which they communicate and discuss narcotics and proceeds, the types of narcotics they sell and distribute, and the locations of their meetings"; that "[l]aw enforcement has been able to learn more regarding the geographic reach of the DTO such as their connection to individuals and narcotics dealers in Rhode Island"; and that the interception formed the basis of a number of geolocation orders that the Government obtained "to monitor the movement of DTO members."

Id. at 59–60. She claimed, however, that "all the goals of the investigation have not yet been accomplished" because Segura-Genao stopped using the -9215 Number shortly after the Second Authorization was issued, and began using the -5802 Number, "thwarting the investigation." *Id.* at 36, 60. She stated that "[t]he brief period during which" Segura-Genao used the -9215 Number "revealed that [he] has access to a number of suppliers and high-level members of the DTO with whom [Alcantara] does not regularly communicate." *Id.* at 60. With respect to the -0190 Number used by Alcantara, Rivera stated that continued wiretapping was necessary because "it is unknown where and from whom [Alcantara] obtains [the] narcotics, who else is involved with the stash house, and who are the customers that [Alcantara] supplies with these narcotics." *Id.* 60–61. She added that a wiretap of the -5802 Number would "specifically further the goal of identifying the DTO's sources of supply." *Id.* at 60. Aside from describing that agents conducted surveillance of a meeting between Segura-Genao, Alcantara, and another DTO member on January 7, 2018, *id.* at 55, Rivera's statements about the insufficiency of other investigative techniques were similar to those made in the First and Second Affidavits. *Compare* Third Affidavit at 52–63, *with* Second Affidavit at 30–38 *and* First Affidavit at 21–28.

On the same day the Third Affidavit was sworn, February 2, 2018, Judge Broderick authorized the wiretaps (the "Third Authorization"). Spilke Decl. Ex. D, ECF No. 52-4 (authorizing wiretap of -5802 Number); *id.* Ex. E, ECF No. 52-5 (authorizing wiretap of -0190 Number). To the Court's knowledge, the DEA did not apply for further wiretaps after the Third Authorization expired on March 4, 2018.

DISCUSSION

I. Legal Standard

To obtain a wiretap, the Government must make an application to a judge of competent jurisdiction. 18 U.S.C. § 2518(1). The application must state the necessity of the wiretap—that

is, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* § 2518(1)(c). "[W]here the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results" must be included. 18 U.S.C. § 2518(1)(f).

"[T]he statutory requirement that other investigative procedures be exhausted before wiretapping reflects a congressional judgment that the cost of such efficiency in terms of privacy interests is too high." *United States v. Lilla*, 699 F.2d 99, 105 n.7 (2d Cir. 1983). If the necessity requirement has not been met, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court." 18 U.S.C. § 2515.

"The purpose of the statutory requirements of § 2518 is not to preclude the government's resort to wiretapping until after all other possible means of investigation have been exhausted by investigative agents; rather, the statute only requires that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." *United States v. Diaz*, 176 F.3d 52, 111 (2d Cir. 1999) (internal quotation marks, alterations, and citation omitted). "While generalized or conclusory statements in an application are insufficient to support a showing of necessity, the application must be viewed in a practical and common sense manner and need be only minimally adequate to support the issuing judge's determination of necessity." *United States v. Trippe*, 171 F. Supp. 2d 230, 236 (S.D.N.Y. 2001) (citations omitted). "The issuing judge's determination that the Government has made adequate use of alternative investigatory techniques is entitled to substantial deference." *Id.*

II. Standing

Any "aggrieved person" may make a motion to suppress the contents of a wiretap. 18 U.S.C. § 2518(10)(a). An "aggrieved person" is "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." *Id.* § 2510(11). The Government does not contest Segura-Genao's standing to challenge all three wiretaps. *See generally* Gov. Mem. In any event, the Court finds that Segura-Genao has standing to move to suppress the contents of the wiretaps of the -9215 Number and the -5802 Number because the interceptions were directed against him. He also has standing to move to suppress the contents of the wiretap of the -0190 Number, because he has submitted an affidavit stating that he has reviewed the recordings of the interceptions of that number and they contain conversations to which he was a party. ECF No. 58. Alcantara also has standing to move to suppress the contents of the wiretap of the -0190 Number because the interceptions of that number were directed against him. *See* ECF No. 92.

III. Analysis

A. First Affidavit

Segura-Genao argues that Rivera's statements in the First Affidavit do not demonstrate why normal investigative techniques appeared reasonably unlikely to succeed or to be too dangerous. Def. Mem. at 8–11. In particular, Segura-Genao objects to Rivera's conclusion that the further use of confidential sources would not have been successful. *See* Def. Reply at 2, ECF No. 64 ("The core of Segura-Genao's argument is that the efforts of the confidential sources . . . had not failed and did not reasonably appear unlikely to succeed."). Segura-Genao makes much of Rivera's statement that the DEA's confidential informants had "exhausted all efforts to successfully negotiate a transaction for the stash of 40 kilograms of heroin and fentanyl." Def. Mem. at 8–10 (quoting First Affidavit at 22). As discussed, Rivera stated in the First Affidavit

that confidential sources had negotiated a purchase of forty kilograms of heroin, but that a DTO member named "El Primo" demanded a $200,000 down payment. First Affidavit at 19. Segura-Genao questions the Government's judgment in deciding to not pay the down payment before applying for a wiretap, claiming that "[c]ommon sense would suggest that the DEA would find it *desirable* to purchase large amounts of narcotics, the bigger the better," and further noting that the affidavits failed to address why the confidential sources could not "persuade the DTO to accept cash so that a flash roll could be employed or to seize the target bank account after the requested $200,000 was wired to it." Def. Reply at 3–5.

The Government, however, need not wait "until after all other possible means of investigation have been exhausted by investigative agents" to demonstrate necessity. *Diaz*, 176 F.3d at 111. The risk of losing $200,000 to alleged drug dealers, when viewed in a "practical and common sense manner," provides a "minimally adequate" explanation for why confidential sources could no longer further the goals of the investigation. *Trippe*, 171 F. Supp. 2d at 236. In any event, as Rivera described, the use of confidential sources is inherently limited because "none of the confidential sources has access to all members of the DTO or even all the [t]arget [s]ubjects," and "the insular nature of the DTO has made it difficult for them to obtain additional points of contact to further infiltrate the DTO." First Affidavit at 22.

The Court also disagrees with Segura-Genao's characterization of this case as similar to *United States v. Lilla*, 699 F.2d 99 (2d Cir. 1983), where the Second Circuit found an affidavit for a wiretap insufficient because it did not demonstrate that normal investigative procedures were unlikely to succeed. Def. Mem. at 9–10. There, in what the Second Circuit described as a "small-time narcotics case," an undercover officer purchased $475 of marijuana from a drug dealer who was "apparently not apprehensive about dealing" with the officer. *Id.* at 101, 104. The court observed that "[i]f anything, the record establishes . . . [that] the normal investigative

procedures that *were* used were successful." *Id.* at 104. The distinctions between that case and this one—which involves the Government's attempt to investigate a large drug trafficking organization that demanded a $200,000 down payment—are obvious. Moreover, in *Lilla*, the undercover officer's previous efforts were not described in his affidavit: rather, the underlying affidavit merely recited that "no other investigative method exists to determine the identity" of the dealer's associates. *Id.* at 104. That is, the affidavit wholly "fail[ed] to specify the facts upon which" the affiant based his conclusion that a wiretap was warranted, and did "not reveal what, if any, investigative techniques were attempted prior to the wiretap request." *Id.* The Second Circuit stated that "the only useful purpose that might be served by the trooper's affidavit in this case is as an exhibit at a police training academy of how *not* to conform to the federal . . . statutory requirements." *Id.* at 105. Here, by contrast, Rivera set forth at length the reasons why normal investigative techniques would not be successful in these particular circumstances. *See* First Affidavit at 21–28.

Segura-Genao also argues that "[t]he recitals in the [First Affidavit] as to normal investigative procedures were conclusory and generic in other respects as well." Def. Mem. at 10. He cites *United States v. Blackmon*, 273 F.3d 1204 (9th Cir. 2001) for the proposition that the necessity requirement was not met here because the First Affidavit contains statements that "can be said about almost any narcotics case." Def. Mem. at 10. In *Blackmon*, however, the application "*only* [made] general allegations that would be true in most narcotics transactions" and "contain[ed] boilerplate conclusions that merely describe[d] inherent limitations of normal investigative procedures." 273 F.3d at 1210 (emphasis added).[3] For example, the application

[3] The *Blackmon* court also found the affidavit at issue to be insufficient for the "interrelated reason" that it "contain[ed] material misstatements and omissions regarding the necessity for the wiretap application." 273 F.3d at 1208–10. No such circumstances are present here.

stated that the use of confidential informants was insufficient because informants "typically only possess limited knowledge concerning the scope of the criminal enterprise," or that the use of witnesses was insufficient because "interviews of witnesses [would] not be successful in developing sufficient evidence to prosecute this entire organization." *Id.* (alteration in original). Segura-Genao cherry-picks, however, the statements in the Affidavits that could be described as generic—for example, Rivera's statement that physical surveillance would be unsuccessful because narcotics transactions typically take place indoors. Def. Mem. at 10; *see also* First Affidavit at 24. It may be so that some of Rivera's statements could describe narcotics cases generally; nevertheless, the First Affidavit contains a multitude of explanations about normal investigative techniques that were specific to this particular investigation. *See, e.g.*, First Affidavit at 22–24 (use of confidential informants).

Accordingly, the Court holds that the First Affidavit complies with 18 U.S.C. § 2518(1)(c)'s necessity requirement.

B. Second and Third Affidavits

Segura-Genao also argues that the Second and Third Affidavits are deficient. Def. Mem. at 11–12. As discussed, Rivera's statements about the necessity of the wiretaps in these affidavits were substantially similar to those in the First Affidavit. First, Segura-Genao contends that the affidavits are deficient for the same substantive reasons that he argues the First Affidavit is deficient; relatedly, he argues that because the First Affidavit was insufficient, "[t]he fruits of an unlawful, Title III interception cannot be used to support another wiretap application." Def. Mem. at 11. Having found that the First Affidavit properly states the necessity for the wiretap, the Court rejects this argument. Next, Segura-Genao argues that in the Second and Third Affidavits, "the government did not give any particularity as to whom it was attempting to identify" in the DTO, and states that "[a] search for more suppliers, more distributors and more

customers could be endless and cannot justify endless wiretaps." *Id.* at 11–12. However, this type of information is precisely what the Government sought in applying for the wiretaps in the Second and Third Affidavits: as Rivera stated, the objectives of the wiretaps sought included the identities of the members and their accomplices, and the source, receipt, and distribution of contraband and money. Second Affidavit at 5; Third Affidavit at 5. In any event, as Segura-Genao observes, after obtaining the First Authorization, the Government identified six new participants in the DTO; after obtaining the Second Authorization, the Government obtained two new participants in the DTO; and it appears that after obtaining the Third Authorization, the Government did not seek any further wiretaps. Def. Mem. at 12. This belies Segura-Genao's argument that the Government was engaged in an "endless" search and sought "endless wiretaps." *Id.* at 11–12.

Accordingly, the Court holds that the Second and Third Affidavits comply with 18 U.S.C. § 2518(1)(c)'s necessity requirement.

CONCLUSION

The Court holds that the First, Second, and Third Affidavits comply with 18 U.S.C. § 2518(1)(c)'s necessity requirement for the reasons set forth above. Defendants' motion to suppress is, therefore, DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 51.

SO ORDERED.

Dated: February 26, 2019
New York, New York

ANALISA TORRES
United States District Judge